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IN THE

Supreme Court of the United States

October Term, 1983

No.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI
-AND-
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

31pp

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QUESTION PRESENTED

MAY AN EMPLOYER, WHICH PARTICIPATES IN A MULTIEMPLOYER BENEFIT PLAN, REFUSE TO MAKE AVAILABLE ITS EMPLOYEE RECORDS, INCLUDING RECORDS OF ITS PURPORTEDLY NON-COVERED EMPLOYEES, WHICH IT IS REQUIRED BY STATUTE TO KEEP TO DETERMINE EMPLOYEE BENEFIT PLAN ELIGIBILITY, TO THE INTERNAL AUDITORS OF THAT MULTIEMPLOYER BENEFIT PLAN.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Arthur Young & Company ("Arthur Young") respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari. The consent of counsel for the Petitioners has been obtained. Consent of counsel for the respondents has been requested and refused.

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young is the independent auditor of Petitioner, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund") and also audits numerous employee benefit plans (several of which are multiemployer plans such as Petitioners). These audits permit the plan trustees to comply with the

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 *et seq.*

Most employee benefit plans are required to file with the Department of Labor annual reports which include the plan's financial statements. The annual reports of plans with over 100 participants must include an independent accountant's opinion that the plan's financial statements have been audited in accordance with generally accepted auditing standards ("GAAS"). As is demonstrated in the brief *amicus curiae*, the ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants to audit multiemployer benefit plans in accordance with GAAS.

Congress required independent audits of the financial statements of employee benefit plans (*i.e.*, employee pension and employee welfare plans) to provide, *inter alia*, a level of assurance on the plan's financial statements. Although an independent audit also provides an important control on the administration of a plan,

> [t]he primary objective of a plan's financial statements is to provide financial information that is useful in assessing the plan's present and future ability to pay benefits when due.

FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARD NO. 35 at § 2 (1980).

In 1974 with the passage of ERISA Congress not only mandated an independent audit, but also required defined benefit pension plans to have triennial actuarial valuations. Both the annual audit and triennial actuarial requirements are complementary: to assure that appropriate information is available so that plan participants and others (including regulatory authorities) can evaluate the ability of a plan to pay benefits when due.

When Congress enacted ERISA requiring that all employee benefit funds be audited in accordance with GAAS, 29 U.S.C. §§ 1023, 1024, there was a defined body of professional practice

and literature detailing the audit procedures necessary in multiemployer health and welfare benefit funds and which also provided guidance for the audits of multiemployer plans. These procedures included the testing of employer records. Congress also knew that to conduct a GAAS audit the independent auditor would be required to test the adequacy of the funding of employee benefit plans according to the law and the terms of the plan. To fulfill this goal, the auditor, *inter alia*, performs tests to determine that the proper universe of plan participants has been identified, contributions have been paid by the employer for each plan participant, and that participant benefit entitlements have been properly reflected in the actuarial calculations and related contributions received or receivable. GAAS thus requires not only the testing of the admittedly covered employees, but also testing for improper exclusion of covered employees from the contribution and benefit calculations.

Since benefit eligibility in a multiemployer plan is determined by an individual's employment status and not whether the employer has contributed to the plan, absent such testing or a comparable alternative procedure, it is impossible to determine if all required employer contributions have been made or if the actuarial valuation of a pension plan was correct. Accordingly, one may not be able to determine if a pension plan is underfunded -- a major concern underlying enactment of ERISA, 29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Act of Sept. 26, 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 1208 and the creation of the Pension Benefit Guaranty Corporation, 29 U.S.C. §§ 1301-1309, in 1974. For example, if there was an annual under-reporting of only one half of one percent (.5%) of all participants currently estimated to be members of multiemployer pension plans (over 8,000,000 as of 1978) and the average employer contribution per participant to multiemployer plans were $50 a week (as it is in National Master Freight Agreement at issue in the underlying proceeding), there would be an *annual initial* under-funding of contributions in excess of $100,000,000

(40,000 omitted participants x $2600) for all multiemployer plans. (The compounded lost earnings from these unmade contributions is staggering.) To the extent plan under-funding occurs, the resultant short falls ultimately must be made up either by all employers in the plan (including those who did not under-report their employees) either through increased contributions or increased premium charges by the Pension Benefit Guaranty Corporation. Moreover, to the extent the existence of under-funding cannot be determined, payments imposed upon employers withdrawing from the plan cannot be properly calculated.

Although recognizing a very limited right of access to employer data concerning purportedly non-covered employers, the opinion of the Sixth Circuit has effectively precluded auditors from testing the universe of plan participants in most multiemployer plans thus creating a possible "scope" limitation on the audit. A "scope" limitation *ipso facto* results in a non-GAAS audit and would require the auditors to "qualify" or "disclaim" their opinions on employee benefit plan financial statements. The trustees would then fail to meet the statutory requirements for an audit of the plan financial statements in accordance with GAAS. Congress could not have mandated an audit knowing what it entailed and at the same time denied plan trustees the ability to fulfill that requirement.

In addition to causing a "scope" limitation in the audit, restricting access to employer data by the plan's internal auditors significantly reduces internal control over contributions legitimately due the plan and thus increases the likelihood of error. The inability in a multiemployer plan audit to routinely test whether purportedly non-covered employees are covered is likely to lead to a greater number of failures by employers to report covered employees (and to make the corresponding required contributions) -- either through inadvertent oversight or possibly as a result of intentional under-reporting. The significant deterrent value of the audit tests would then be lost.

Thus *amicus curiae* Arthur Young has a direct interest in the outcome of this proceeding -- not only as it affects (and may

substantially impair) its ability to conduct its audit of the Central States Pension Fund, but also its ability to conduct audits of other multiemployer benefit plans. As a result of the Sixth Circuit opinion, one employer has already refused access of its records to Arthur Young and it is concerned that other employers will do likewise.

WHEREFORE, Arthur Young respectfully moves this Court that leave be granted to it to file the annexed brief *amicus curiae*.

Dated: July 6, 1983

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Arthur Young & Company ("Arthur Young") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari and urges that this Court review the judgement and opinion for the United States Court of Appeals for the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983).

The petition for certiorari materially affects the ability of over 2000 multiemployer pension plans with over $50 *billion* in assets and in excess of 8,000,000 plan participants to comply with Congressionally mandated audit (and actuarial) requirements. It

also impacts multiemployer welfare plans. In fact, if the decision of the Sixth Circuit is allowed to stand, the salutory purposes of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 1980 U.S. CODE CONG. & AD NEWS (94 Stat.) 1208, could be substantially jeopardized.

INTEREST OF AMICUS CURIAE

Arthur Young, a partnership of certified public accountants, has over 90 offices and 6000 professionals in the United States. In addition to auditing public and private companies, Arthur Young is the independent auditor of Petitioner, Central States, Southeast and Southwest Areas Pension Fund ("Central States Pension Fund"), as well as numerous employee benefit plans several of which are multiemployer plans such as Petitioners. These audits permit the plan trustees to comply with ERISA, 29 U.S.C. §§ 1001-1461 (1976 & Supp. V. 1981), and the regulations promulgated thereunder, 29 C.F.R. § 2520.103 (1982) *et seq.*

Most employee benefit plans are required to file with the Department of Labor annual reports which include the plan's financial statements. The annual reports of plans with over 100 participants must include an independent accountant's opinion that the plan financial statements have been audited in accordance with generally accepted auditing standards ("GAAS"). The ruling of the Sixth Circuit is inconsistent with this requirement and will materially impair the ability of independent certified public accountants, such as Arthur Young, to conduct audits of multiemployer employee benefit plans in accordance with GAAS.

Thus *amicus curiae*, Arthur Young, is vitally interested in having this Court resolve the question presented by this Petition:

> May an employer, which participates in a multiemployer benefit plan, refuse to make available its employee records, including records of its purportedly non-covered employees, which it is required by statute to keep to determine employee benefit plan eligibility, to the internal auditors of that multiemployer benefit plan.

THE PROCEEDING BELOW

In complying with their statutory obligations, the joint internal audit staff of Petitioners, Central States Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, both of which are multiemployer benefit plans, sought to examine the employment records of respondents, contributing employers, to ascertain whether respondents had employees who were covered by the plans and for whom funding contributions had not been made by respondents. When respondents refused access to their records, Petitioners obtained an injunction directing respondents to make the necessary records available. 522 F. Supp. 658 (E.D. Mich. 1981). On appeal, the Sixth Circuit reversed, 698 F.2d 802, holding that petitioners had no right to conduct such an audit. 698 F.2d at 806.

SUMMARY OF ARGUMENT

In denying access to the records of purportedly non-covered employees, the Sixth Circuit committed several critical errors:

> (1) it narrowly viewed the trustees' responsibilities and ignored the statutory requirement that the trustees obtain an annual independent audit in accordance with GAAS and a "clean" opinion on the plan's financial statements;
>
> (2) it concluded that as a matter of law no audit of employer records to ascertain plan participants by Petitioners was authorized, but failed to recognize that such an audit is inherently related to the required independent audit of the plan, 698 F.2d at 8′ ›; and
>
> (3) it concluded as a matter of law that an audit of all employer records was "arbitrary and capricious," even though the court conceded that under the plan trust agreements there was a "reasonable cause" standard supported by the "prudent man" standard of ERISA, 29 U.S.C. § 1104(a)(1)(B), allowing at least a limited right of investigation, 698 F.2d at 811.

On the contrary ERISA implicitly authorizes access to all employee records of employers who participate in multiemployer

benefit plans to permit the trustees to meet the statutory reporting requirements and fiduciary obligations of ERISA. By denying even limited access to employer records to determine whether employees were improperly excluded and contributions omitted, the decision of the court of appeals effectively precludes the trustees from fulfilling statutory obligations and makes difficult, if not impossible, an independent audit of the plan. The decision of the court of appeals negates the substantial deterrent effect that the possibility of an audit has and materially increases the possibility that under-funding will result thereby jeopardizing the solvency of employee benefit plans. Finally, it adversely impacts the accurate calculation of fund termination payments upon withdrawal of an employer from the plan.

ARGUMENT

I.

BACKGROUND-MULTIEMPLOYER PLANS

Multiemployer benefit plans are generally industry wide employee benefit plans covering all or some of a participating company's employees, 29 U.S.C. § 1002 (37). They are usually jointly administered by management and labor under a collective bargaining agreement. They provide a variety of benefits such as retirement, health, and welfare benefits.

Covering employees of more than one company, multiemployer plans can include hundreds or even thousands of employers from all over the country, or only a few employers in one area. Plan participants may include both union and nonunion employees. Over 8,000,000 employees in construction, mining, shipping, trucking, food retailing, textiles, and other industries currently participate in over 2000 multiemployer plans[1]--covering approximately 25% of all U.S. workers protected by defined benefit pension plans in the private sector. NATIONAL JOURNAL, June 26, 1982 at 12. A 1980 Department of Labor

1. Multiemployer plans currently control over $50 billion in assets. Lublin, *Law to Protect Multi-Employer Pensions Is Causing Hardship for Many Businesses*, Wall St. J. Mar. 5, 1982 at 40, col. 1.

study estimated that more than 16 million workers will be covered by multiemployer pension plans by the year 2000. 1979-1981 PENS. PLAN GUIDE ANNOT. (CCH) ¶22,877 (OCT. 15, 1980).

Virtually all multiemployer plans require contributions solely from employers. *Id.* For these plans funding is solely dependent on employer contributions and plan eligibility is determined "solely on the basis of service performed for a participating employer, regardless whether that employer . . . has made or defaulted on his required contributions." Advisory Opinion, 31 August 1976, PENS. REP. (BNA), No. 221, Jan. 8, 1979. Accordingly, even if an employer fails to report the employee as a participant and make the required contribution, the multiemployer plan is obligated to pay those benefits when demanded, *see* 29 U.S.C. §§ 1052 and 1053; 29 C.F.R. § 2206-2(a)(1)(2), thus creating an under-funding situation for the plan.

Although multiemployer plans were subject to ERISA, it was the Multiemployer Pension Plan Amendments Act of 1980 (MEPPAA) which directly addressed a growing concern over inadequate funding of these plans. The Pension Benefit Guaranty Corporation (PBGC):

> found that 12 percent of all multiemployer pension plans, covering one-fifth of all multiemployer pension plan participants, are experiencing extreme or significant financial hardship which may result in plan termination. . . . Two percent of all multiemployer plans, with a total unfunded, vested liability of more than $350 million, were found to be experiencing extreme financial hardship and to have a high potential for termination. The remaining 10 percent were deemed to have a significant potential for termination, with a total unfunded vested liability of $3.5 billion.

S. REP. No. 570, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4128, 4129 (footnote omitted). Inadequate funding caused by, *inter alia*, under-reporting and declining work forces in certain industries could lead to billions of dollars in unfunded liabilities, far more than the resources available to the PBGC to cover any failures. PENSION BENEFIT

GUARANTY CORPORATION, *Multiemployer Study Required by P.L. 95-214 (1978)*, Appendix I, Potential Multiemployer Plan Liabilities Under Title IV of ERISA.

II.

CONGRESS DIRECTED THAT MULTIEMPLOYER BENEFIT PLANS HAVE ANNUAL INDEPENDENT AUDITS OF PLAN FINANCIAL STATEMENTS IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS.

A. The Audit Requirement

Congressional concern with employee benefit funds dates back to the enactment of the 1947 Labor Management Relations Act. H.R. REP. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1135, 1173. In 1947, one way Congress sought to protect certain employee benefit funds was by requiring an annual audit of such funds. 29 U.S.C. § 186(c)(5).

The legislative history reveals that the annual audit requirement was intended to put safeguards on the improper and unsuccessful administration of employee benefit funds. Accordingly, Congress decreed that company contributions to employee benefit funds would not constitute an unfair labor practice if such funds were "guarded by certain restrictions, such as that it should be . . . subject to joint control by employer and employees *and by an annual audit* to insure its protection as a trust fund." 93 CONG. REC. 3565 (1947). (Emphasis added).

In 1974 ERISA supplemented existing reporting and disclosure requirements with provisions requiring the reporting of more detailed information concerning the administration of plan assets and the payments of benefits. Moreover, it continued and strengthened the independent audit requirement, 29 U.S.C. § 1023(a)(3)(A), by adding to the arsenal of weapons to protect employee benefit plans already available to the Secretary of Labor the right to hire independent auditors to audit such plans. 29 U.S.C. § 1024(a)(5).

In enacting ERISA Congress was concerned over the adequacy of information available on employee plans. The House Report, evidencing this concern, noted that:

> . . . experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

H. R. REP. No. 533, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4649.

The Senate Report similarly concluded that an opinion of an independent auditor based upon the results of an annual audit would "allow better assessment of the plan's financial soundness by administrators and participants alike." S. REP. No. 127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4864. The Conference Report, recognizing the importance of the audit requirement, specifically noted that "the accountant is to give an opinion as to whether the financial statements of the plan conform with generally accepted accounting principles and the statement is to be based upon an examination in accordance with generally accepted auditing standards." H. CONF. REP. 1280, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5040.

B. What an Audit of a Multiemployer Benefit Plan in Accordance With GAAS Entails

1. *Auditing employer records*

When Congress imposed the audit requirement for employee benefit plans under ERISA, a body of professional literature and practice existed outlining the procedural steps required for audits in general and audits of employee benefit plans in particular. For example, in 1972, the American Institute of Certified Public Accountants had published an Industry Audit Guide, AUDITS OF EMPLOYEE HEALTH AND WELFARE BENEFIT FUNDS, which, although not directly controlling audits of pension plans, summarized audit requirements that had general applicability to pension plans and specific applicability to employee health and welfare funds such as Petitioners Central States, Southeast and Southwest Areas Health & Welfare Fund. The Guide noted that not only its specific requirements apply, but:

> Generally accepted auditing standards apply to audits of an employee health and welfare benefit funds to the same extent they apply to the audits of a commercial enterprise.

AICPA, AUDITS OF EMPLOYEE HEALTH AND WELFARE BENEFIT FUNDS (1972) at 18.

The 1972 Industry Audit Guide reviewed the critical areas of employee health and welfare benefit fund audits. One such area was the audit of employer contributions -- the basic funding vehicle for any benefit plan:

> Contributions
>
> The basic objective in auditing contributions is to determine that amounts due the fund have been received and properly recorded and that employer records and participant records (eligibility or vacation contribution) are being properly maintained.
>
> * * *
>
> The auditing procedures employed should normally include, but are not necessarily limited to, the following:

(1) Total cash receipts shown by the cash receipts book for a selected period should be reconciled to the total amount credited to the general ledger contribution accounts, to the total amount posted to the employer's record, and to deposits shown by the bank statements.

(2) Selected individual employer contribution payments as shown by the cash receipts book should be compared to the amount shown on the employer's contribution report and to the amount posted to the individual employer's contribution record. Selected postings to the employer's record during the test period should be traced to the cash receipts book and to the employer's contribution report.

Id. at 19.

Although these audit procedures were initially directed at the Plan's own records, of necessity, they also had relevance to an employer's records. Accordingly, when the auditor deemed it necessary, direct review of all employer's records was undertaken. Such procedures would include:

Payroll Audits

There may be circumstances in which the independent auditor is engaged to conduct audits of employers' payroll records to determine the propriety of the contributions made. The following paragraphs outline certain procedures which should be considered in the audits of employers selected:

(1) The collective bargaining agreement should be reviewed to determine that the employer has complied with the applicable provisions.

(2) The total gross earnings shown by the employees' earnings records should be reconciled with total wages shown by the general ledger and the payroll tax reports.

(3) Information shown on the employer's contribution reports for a selected number of participants should be compared with the data shown on the employees' earnings

records. In addition, a selected group of participants' earnings records should be compared with the employer's contribution reports to ascertain that they have been properly included or excluded from the reports.

(4) The employer's general cash disbursements book should be reviewed to ascertain whether any payments not recorded as compensation have been made to employees.

(5) For a selected period of time and for a selected group of employees, the data shown in the payroll journal should be compared to the employee earnings records and time records, and the related payroll checks should be examined.

All exceptions to the foregoing tests should be cleared to the independent auditor's satisfaction.

Id. at 20-21.

To verify participants' data, the auditor must be able to test the entire universe of employees (participants and non-participants[2]), to gain assurance that participant records (and related pension plan liabilities) are neither understated nor overstated. As the pre-ERISA auditing literature (and practice) clearly indicated, verification of participation data is an integral part of a benefit plan audit.[3]

---

2. The audit literature applicable to all audits provides substantial guidance as to the problem raised by the possible failure to include all participants:

> When planning a particular sample [for a substantive test], the auditor should consider the specific audit objective to be achieved and should determine that the audit procedure, or combination of procedures, to be applied will achieve that objective. The auditor should determine that the population from which he draws the sample is appropriate for the specific audit objective. *For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.*

AICPA, STATEMENT ON AUDITING STANDARDS ("SAS") No. 39 ¶ 17, AU350.17 (Emphasis added.)

3. In recognition of applicable professional standards, Arthur Young's own internal ERISA audit manual provided:

The Guide further prescribed that a disclaimer of opinion on the financial statements of a multiemployer benefit plan would be appropriate when the auditor could not gain assurance as to "the propriety of employer contributions." *Id.* at 29.

Most recently, the AICPA issued a new Audit and Accounting Guide, covering all employee benefit plans, which codifies existing literature and prior practice: AICPA, AUDITS OF EMPLOYEE BENEFIT PLANS (1983). The 1983 Guide expressly recognizes, as had the 1972 Guide, that in "examining the financial statements of a multiemployer plan, the auditor may need to make special arrangements to examine employer records" *Id.* at 56; and concludes, as did the earlier Guide, that "[i]f the auditor is unable to obtain the necessary assurance regarding participants' data, he ordinarily should conclude that it will be necessary to express a qualified opinion or disclaim an opinion because of the limited scope of the examination." *Id.* at 63.

In imposing a GAAS audit requirement, Congress did so in the face of an established body of procedures which contemplated

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The objective of the verification, when necessary, is to ascertain whether the data is complete, primarily that all eligible participants are included and that all relevant data has been provided, and accurate. (Eligible participants include present employees who meet the participation requirements of the plan, terminated employees who have vested benefits, and retired employees or their surviving spouses or other dependents receiving benefits.) Verification procedures usually include:

- Determining benefit eligibility requirements and the statistical data about eligible participants necessary for the actuary to make his computations.
- Testing the completeness and accuracy of the list of eligible employee participants by applying the eligibility requirements to employment records, both for employees on the list and not on the list.
- Testing the accuracy of the statistical data about other eligible participants by reference to employment and payroll records.
- Testing the accuracy of the employment and payroll records from which the data is obtained.

access to and, when needed, an audit of employer records to test plan participation data such as plan membership and contributions.

2. *The use of internal auditors to satisfy GAAS.*

In conducting an audit, not every record of the entity under audit is examined. The independent auditor studies and evaluates a client's internal controls to determine which records will be tested and the degree of reliance which can be placed on those records and the internal controls. AICPA, SAS No. 1, AU320.01. One such internal control is the presence of an effective internal audit function. AICPA, SAS No. 9, AU322. As part of the study and evaluation of internal control, the independent auditor evaluates the work performed by the internal audit function in determining the nature, timing, and extent of its own procedures. AICPA, SAS No. 9, AU322.02.

In the audits of the Central States Pension Plan, Arthur Young not only independently tests plan participation data by directly seeking employer records, but also uses the work of the Central States internal auditors in this area. Thus, the work of the Central States internal auditors, which is at issue here, is an integral part of Arthur Young's statutory audit. 29 U.S.C. § 1023(a). Absent the work of the Central States internal auditors, Arthur Young would have to materially increase its own procedures at increased cost to the Plan or render a "qualified" opinion based on a "scope" limitation in the audit.

C. The Impact of a Qualified Auditor's Opinion

The statute requires a GAAS audit resulting in an opinion by the independent auditor "as to whether the financial statements are presented in accordance with Generally Accepted Accounting Principles." 29 U.S.C. § 1023(a)(3)(A). The Department of Labor has authorized independent auditors to have "scope" limitations in the audit in a very limited category of situations not applicable here. 29 C.F.R. § 2520.103-8. A "qualified" or "disclaimed" opinion resulting from a "scope" limitation relating to

the inability to test plan participation data does not comply with either the Labor Management Relations Act of 1947 or ERISA. Arthur Young has been orally informed by the Department of Labor that in all likelihood the absence of a "clean" opinion caused by a "scope" limitation will be treated as a failure by a plan to comply with the Annual Report filing requirements. *Cf.* 29 C.F.R. §§ 2520.103-1(b)(5)(iv) and 2520.103-2(b)(5)(iv).

III.

CONGRESS INTENDED PLANS TO HAVE ACCESS TO ALL EMPLOYER RECORDS.

A. Access to all employer data was contemplated by Congress in order to satisfy the audit requirement.

One objective of financial statements of employee benefit plans is to permit the assessment of the adequacy of a plan's present and future ability to pay benefits to covered employees. FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARD NO. 35 at ¶ 2 (1980). The Sixth Circuit decision, *Central States* v. *Central Transport, Inc.*, 698 F.2d 802 (6th Cir. 1983), restricting the scope of an audit only to employer records of concededly covered employees, defeats this objective.

Since multiemployer plans are liable for benefits to eligible employees whether or not a particular employer has made contributions on the employees' behalf, *see* 29 U.S.C. §§ 1052 and 1053, Advisory Opinion, 31 August 1976, PENS. REP. (BNA), No. 221. Jan. 8, 1979, it is important to ascertain whether any plan participants have been omitted and if all required contributions have been made. If access to the "entire universe" (*i.e.*, both admittedly covered and allegedly non-covered employees) of plan participants is denied, no one will be able to assess whether the plan financial statements reflect all benefits likely to be paid and, more importantly, all required contributions to fund those benefits.

It is in this context that Congress required employer record keeping for all employees,[4] not just plan participants, 29 U.S.C. § 1059(a), and imposed penalties on employers who failed to keep such records. 29 U.S.C. § 1059(b). Moreover, Congress imposed on employers reporting obligations based on these record keeping requirements. 29 U.S.C. § 1059(a).

A court imposed "scope" limitation on access to all employer records is likely to create an insurmountable audit problem to discovery of instances of under-reporting and non-reporting for alleged non-covered employees who are in fact covered by and entitled to plan benefits. In fact, to deny access to those records inhibits crucial auditing procedures, violates established standards of auditing practice, and essentially renders the reporting, disclosure, and auditing requirements of ERISA and the Labor Management Relations Act ineffective.

Moreover, when Congress enacted the audit requirements of ERISA and established the foregoing employer record keeping and reporting requirements for *all* employees, existing audit practices included the testing of employer records to determine whether there were unreported employees who were nevertheless entitled to benefits. *Supra* at 8-12. As the record keeping requirement complements the audit requirement by assuring the availability of information to make the necessary evaluations, the two provisions should be read together. To deny access to the very records which Congress has required employers to keep to determine both plan eligibility and the amount of employer contributions while requiring an audit which must examine, *inter alia*, the universe of plan participants, which in turn requires access to those records, creates an internal inconsistency in the statute.

Application of the basic rules of statutory construction further supports the view that the Sixth Circuit decision is contrary to congressional intent and inconsistent with the applicable statute. It is an established tenet of statutory construction that acts of

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4. The definition of employee as set forth in ERISA, 29 U.S.C. § 1002 (6) includes any individual employed by an employer. Thus, ERISA fails to make a distinction between "covered" and "non-covered" employees.

Congress relating to the same subject matter are to be read *in pari materia*. *Weinberger* v. *Hynson, Westcott and Dunning, Inc.* 412 U.S. 609, 631-32 (1973) [separate provisions of a single act should be interpreted to give the Act "the most harmonious, comprehensive meaning possible" in light of the legislative policy and purpose]. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 51.03 (4th ed. 1973). This harmony can only be achieved here if 29 U.S.C. § 1059 is read as a grant of authority to a Plan to enable it to fulfill its statutory audit requirement.

Finally, although the Sixth Circuit recognized that there is a "reasonable cause" standard which allows access to employer records, 698 F.2d at 810, it felt it was arbitrary and capricious to "audit" *all* employee records of the employer. *Id.* at 811. This holding failed to consider the statutory requirement placed on the trustees to obtain an independent audit of the plans and obtain an opinion on the plan's financial statements as to whether they were prepared in accordance with generally accepted accounting principles. Since the failure to obtain access to the employer records could result in a non-GAAS audit and a "qualified" or "disclaimed" opinion on the plan's financial statements, it follows that the Sixth Circuit's holding that, as a matter of law, a request for inspection of "non-covered" employee records is "arbitrary and capricious" is, *a fortiori*, incorrect. In fact, failure to seek access to the records may be a failure by the trustees to maintain adequate internal controls which, *inter alia*, could result in a scope limitation in the audit and could well violate the "prudent man" standard found in ERISA, 29 U.S.C. § 1104(a)(1)(B).

B. In order to ascertain funding requirements access to all employer data was contemplated by Congress

Another Congressional concern was the possible draining of fund assets in the future by persons unidentified in the plan records and for whom employer contributions were not made. At the time such under-reporting becomes known, the employer responsible may be neither in business nor a participating employer.

1. *Lack of access to employer data precludes adequate funding determinations required by Congress*

The Multiemployer Act of 1980 significantly changed an employer's funding responsibilities in a multiemployer plan. An employer's obligation to fund benefits is no longer limited to its negotiated contribution plus a modest contingent liability upon withdrawal.

When an employer withdraws completely or partially from a plan, the Act converts what would otherwise be a contingent liability assessed only on plan termination into a present liability for the employer's share of all unfunded vested benefits. 29 U.S.C. §§ 1381 *et. seq.* In three out of the four methods for calculating an employer's withdrawal liability, amounts are reallocated from other employers who have escaped liability. 29 U.S.C. § 1391. (Thus, an employer may become liable for benefits earned by workers who were never in its employ.)

Moreover, to minimize the impact of underfunding, the Multiemployer Act of 1980 also provided that, to the extent multiemployer pension plans were underfunded, all employers in the plan could be assessed to cure the underfunding. 29 U.S.C. § 1421 *et. seq.* If a plan does not meet the funding standards required by the Act, a plan may be placed in reorganization and an employer's contribution may be increased to prevent the plan from terminating. 29 U.S.C. § 1423(b). If a plan terminates, employers may be required to continue to contribute in order to fund the plan's unfunded vested benefits. Thus, the burden for such latent benefits due to under-reporting falls on other employers through increased future contributions to the plan and probably increased insurance premiums to the PBGC.

Unless the total universe of plan participants is identified, the actuarial computations to determine plan funding, 29 U.S.C. §§ 1023(d) and 1393, and withdrawal liabilities, 29 U.S.C. § 1391, are suspect and both an employer's current funding obligations and withdrawal liabilities cannot be determined, let alone accurately determined. Accordingly, access to all employee data to ascertain that all plan participants are reasonably accounted

for and required contributions made is essential to the proper administration of multiemployer plans. Thus, the passage of the Act makes the need for comprehensive audits to permit reliable assessment of funding liability all the more critical.

2. *The PBGC is adversely affected*

In order to insure that payments will be made to all employees entitled to benefits, Congress created an insurance funding mechanism through the PBGC. Employers in single employer plans and multiemployer plans are assessed an "insurance premium" to cover both actual and estimated shortfalls in benefit payments because of underfunded plans. 29 U.S.C. §§ 1301 *et seq.* The PBGC constantly reviews both the financial statements and actuarial reports of pension plans to assess the adequacy of funding. Failure to have reliable information on which to make these critical assessments would impair the ability of the PBGC to effectively fulfill its statutory mandate.

CONCLUSION

If there is a failure to report only one half of one percent (.5%) per year of employees eligible to participate in all multiemployer plans, contributions to multiemployer pension plans will be underfunded at an *initial* rate of over $100,000,000 *per year.* (When the lost compounded earnings that would have been generated by these contributions is taken into account, the amount of the underfunding becomes staggering.) Congress clearly did not intend such a result; in fact, the legislative history shows Congress intended the audit and actuarial functions to be one line of defense against such potential underfunding. The decision of the Sixth Circuit is inconsistent with clearly defined obligations imposed upon both the trustees and independent auditors by Congress. The decision substantially undermines the ability to assess the adequacy of funding of all multiemployer benefit plans and could lead to substantial instances of under-reporting of covered

employees either through inadvertence or design. Thus the deterrent effect of the audit process would be substantially weakened. Finally, the ability to calculate employer plan withdrawal liabilities is adversely impacted.

Wherefore *Amicus Curiae* Arthur Young respectfully requests that this Court grant certiorari to determine this critically important question.

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Respectfully submitted,

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APPENDIX

§ 1002. ***Definitions***

For purposes of this subchapter:

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

§ 1023. ***Annual Reports***

(a) (1) (A) An annual report shall be published with respect to every employee benefit plan to which this part applies.

* * *

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include --

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

(3) (A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem

necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b) (3) of this section and the summary material required under section 1024 (b) (3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply.

* * *

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

* * *

(4) (D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) An annual report under this section shall include a financial statement containing the following information:

* * *

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

* * *

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

* * *

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

Actuarial statement

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report if filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination priority categories as set forth in section 1344 of this title, and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this title (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

§ 1024. ***Filing and furnishing of information***

(a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

* * *

(5) If the Secretary rejects filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions—

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

§ 1030. ***Alternative methods of compliance***

(a) The Secretary on his own motion or after having received the petition of an administrator may prescribe an alternative

method for satisfying any requirement of this part with respect to any pension plan, or class of pension plans, subject to such requirement if he determines—

(1) that the use of such alternative method is consistent with the purposes of this subchapter and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary,

(2) that the application of such requirement of this part would—

(A) increase the costs to the plan, or

(B) impose unreasonable administrative burdens with respect to the operation of the plan, having regard to the particular characteristics of the plan or the type of plan involved; and

(3) that the application of this part would be adverse to the interests of plan participants in the aggregate.

(b) An alternative method may be prescribed under subsection (a) of this section by regulation or otherwise. If an alternative method is prescribed other than by regulation, the Secretary shall provide notice and an opportunity for interested persons to present their views, and shall publish in the Federal Register the provisions of such alternative method.

§ 1059. ***Recordkeeping and reporting requirements***

(a) (1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053(b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

* * *